Filed 12/27/04 Avihod v. Daystar Development Inc. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ELI AVIHOD, Plaintiff and Appellant, v. DAYSTAR DEVELOPMENT INC. et al., Defendants and Respondents.	B167837 (Los Angeles County Super. Ct. No. LC055582)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard G. Kolostian, Judge. Affirmed.

Law Offices of Leon Small and Leon Small for Plaintiff and Appellant.

Law Office of Steven Berkowitz and Steven Berkowitz for Defendants and Respondents.

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Plaintiff Eli Avihod, under a power of attorney for Judith Schacter (Avihod), appeals from a judgment in favor of defendants Daystar Development Inc. and Yehuda Netanel (Daystar) on Avihod's claim for breach of an *oral* contract by Daystar to return Avihod's investment of $571,715 in a failed limited liability company, Bakersfield Grand Canal, LLC (the LLC). The trial court sustained without leave to amend Daystar's demurrer to the complaint on the ground that Avihod failed to allege a valid claim against Daystar, the alleged manager of the LLC, under Corporations Code section 17158, subdivision (b)(2) (section 17158(b)(2)),[1] which affords an exception to the rule prohibiting personal liability of a manager of a limited liability company for the debt, obligation or liability of the company if the manager agreed to be obligated personally "[p]ursuant to the terms of a written guarantee or other contractual obligation entered into by the manager, other than an operating agreement." (§ 17158(b)(2).) Avihod contended that an oral agreement satisfied section 17158(b)(2) because the word "written" modified only the word "guarantee" and not the phrase beginning "other contractual obligation." The trial court construed the statute otherwise. We agree with the trial court and affirm the judgment.

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[1] Unless otherwise stated, statutory references are to the Corporations Code.

Section 17158 provides: "(a) No person who is a manager or officer or both a manager and officer of a limited liability company shall be personally liable under any judgment of a court, or in any other manner, for any debt, obligation, or liability of the limited liability company, whether that liability or obligation arises in contract, tort, or otherwise, solely by reason of being a manager or officer or both a manager and officer of the limited liability company. [¶] (b) Notwithstanding subdivision (a), a manager of a limited liability company may agree to be obligated personally for any or all of the debts, obligations, and liabilities of the limited liability company as follows: (1) If the agreement to be so liable is set forth in the articles of organization or in a written operating agreement that specifically references this subdivision. [¶] (2) Pursuant to the terms of a written guarantee or other contractual obligation entered into by the manager, other than an operating agreement."

Avihod bases his claim solely on section 17158(b)(2).

BACKGROUND

According to the allegations of the second amended complaint (complaint), in January 1997, Avihod invested a total of $571,715 in the LLC, the purpose of which was to acquire and develop an outlet shopping center in the Bakersfield area. Avihod, as a member of the LLC, signed an operating agreement setting forth his rights and responsibilities as a member. The operating agreement provided that it was to govern "the relationships among Members of [the LLC] and between [the LLC] and Members . . . ." Although the operating agreement provided that the manager of the LLC "shall be a Person elected by Members of [the LLC] to manage [the LLC]," the operating agreement did not identify Daystar or any other particular entity as the manager. Daystar was also a member of the LLC and signed the operating agreement in that capacity. Later, Daystar was elected as the manager of the LLC.

The operating agreement provided that "[i]f for any reason, the [LLC] is unable to acquire the Real Property and to record a construction loan by July 31, 1998, then the [LLC] shall immediately terminate and the Manager will on or before June 30, 1998, return all Initial Contributions heretofore made, along with eight per cent (8%) per annum on the amounts contributed." A 1998 amendment to the operating agreement extended the time to acquire the property and obtain a construction loan to March 31, 1999, and the time to return the initial contributions to June 30, 1999.

Avihod alleged that during the time he made his investment in the LLC, he and Daystar entered into an oral agreement whereby Daystar promised that in the event that the LLC was unable to obtain the property or a construction loan by the date in the operating agreement, Daystar would "personally and directly" repay his entire contribution plus accrued interest. The LLC never acquired the real property and never

obtained a construction loan. Avihod made a written demand on Daystar for the return of his investment, which Daystar failed to return.[2]

Avihod then brought this action against Daystar for breach of an oral contract and for fraud. Daystar demurred to the claim for breach of oral contract on the ground, among others, that section 17158(b)(2) precludes the assertion of liability against a manager based on an oral contract. After the trial court sustained without leave to amend Daystar's demurrer to the breach of oral contract claim, the matter proceeded to a jury trial on the fraud claim. The jury, in its special verdict, found that Daystar made a promise as to a material matter, but at the time the promise was made, Daystar intended to perform it. A judgment was entered in favor of Daystar and Avihod appealed, challenging only the ruling sustaining the demurrer to his breach of oral contract claim.

DISCUSSION

The issue presented on this appeal is the proper interpretation of section 17158(b)(2) and whether the word "written" modifies only the word "guarantee," as asserted by Avihod, or whether it also modifies the phrase beginning "other contractual obligation."

"Statutory construction is a question of law we decide de novo. [Citation.] Our primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. (Code Civ. Proc., § 1859.) Intent is determined foremost by the plain meaning of the statutory language. If the language is clear and unambiguous, there is no need for judicial construction." (*City of Brentwood v. Central Valley Regional Water Quality Control Bd*. (2004) 123 Cal.App.4th 714, 722.) Interpretations which lead to absurd results or render words surplusage are to be avoided. (*Camarillo v. Vaage* (2003) 105 Cal.App.4th 552, 562.)

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[2] The LLC is not a party to this action. Avihod also does not allege that the failure of the LLC was due to any fault on the part of Daystar. According to Daystar's trial brief on Avihod's fraud claims, it appears the project failed when a key tenant pulled out of the project, causing the loss of other prospective tenants.

"Most readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series unless another adjective appears. For example, if a writer were to say, 'The orphanage relies on donors in the community to supply the children with used shirts, pants, dresses, and shoes,' the reader expects the adjective "used" to modify each element in the series of nouns, 'shirts,' 'pants,' 'dresses,' and 'shoes.' The reader does not expect the writer to have meant that donors supply 'used shirts,' but supply 'new' articles of the other types of clothing." (*Ward General Ins. Services, Inc. v. Employers Fire Ins. Co*. (2003) 114 Cal.App.4th 548, 554 [court interpreted insurance policy providing coverage for "direct physical loss of or damage to Covered Property" to mean that "direct physical" modified both "loss of" and "damage to"].)

According to the rule of statutory construction that absurd results and surplusage are to be avoided, we reject Avihod's interpretation of section 17158(b)(2), under which the phrase "other contractual obligation" would be broad enough to include all written and oral contracts (other than an operating agreement), thus rendering the phrase "written guarantee" mere surplusage.

Similar grammatical structures have been interpreted to require that an adjective before two nouns or noun phrases modify both nouns or noun phrases when the nouns are not separated by a comma and are joined by the word "or," as in section 17158(b)(2). For example, the language and punctuation of a phrase in an insurance policy defining a contract as "any written contract or agreement" was interpreted to mean that the adjective "written" modified both "contract" and "agreement." (*Indemnity Ins. Co. v. Pacific Clay Products Co*. (1970) 13 Cal.App.3d 304, 313 (*Indemnity Ins. Co*.).) "It should be noted, in the clause defining the word 'contract' as 'any written contract or agreement,' there is no comma following the word 'contract,' but there is a comma following the word agreement.' The language and punctuation used indicates the adjective 'written' modifies the phrase 'contract or agreement.' [Citation.] [¶] . . . Were [appellant's] interpretation accepted, the clause 'written contract or agreement' would mean any

written contract, or written or oral agreement, expressed or implied. This is unreasonable and absurd." (*Ibid*.)

Citing *Indemnity Ins. Co*., the court in *State Farm Mut. Auto. Ins. Co. v. Mrozek* (1972) 29 Cal.App.3d 113 held that, with respect to the phrase "farm-type tractor or equipment" in a statute setting forth exclusions from the term "uninsured motor vehicle," the compound adjective "farm-type" modified both "tractor" and "equipment." The court explained that "[t]here is no comma after 'tractor.' The phrase reasonably means farm-type tractor or farm-type equipment." (*Id*. at p. 116.)

As Avihod cites no pertinent authority in his brief to support his interpretation of section 17158(b)(2), we conclude that the trial court properly sustained Daystar's demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Daystar Development Inc. and Yehuda Netanel are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

I concur:

SUZUKAWA, J.*

I concur in the judgment only:

VOGEL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.